FILED
DEC 26 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )

Plaintiff-Appellee, )

vs. )

PENNY MILLER, )

Defendant-Appellant. )

Filed December 26, 1984 557

4-419
83-1658

Appeal from the Iowa District Court for Jasper County - Van Wifvat and Thomas S. Bown, Judges.

Defendant appeals her sentence for voluntary manslaughter. AFFIRMED.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell, and Schlegel, JJ.

Defendant was charged by trial information with first-degree murder. An amended and substituted trial information was filed charging defendant with voluntary manslaughter and assault while participating in a felony.

The defendant pled guilty to the offenses charged in the amended and substituted information. At the guilty plea proceeding, she did not admit to the offense of first-degree murder and she did not make any statements to indicate that the elements necessary to show first-degree murder were satisfied. The defendant also made no admission of first-degree murder to the presentence investigator.

At the sentencing, the court stated its reasons for the imposition of the sentence:

> All right. As I mentioned earlier, this Defendant appeared before this Court, Judge Van Wifvat, on the 10th day of October, at which time she entered a plea of guilty to the two charges.
>
> Now, as Attorney Owens has said, this is a tragic case. We have a young girl here now only 16 years of age for whom I think there is a lot of hope and, of course, there are reasons at least advanced to explain what happened. I am not saying that the reasons advanced excuse what happened or condone what happened, but they do tend to explain them. I think, however, that that has been reflected in the fact that the charge originally filed was Murder in the First Degree and it was in this case reduced to Voluntary Mansalughter, which is a substantial reduction.
>
> And since we do have a homicide here, any question of a probation I think would unduly deprecate the seriousness of the offense.

The defendant was then sentenced to a term of up to ten years on each count, with the sentences to run concurrently. Defendant appeals her sentence asserting that the trial court improperly relied on the reduction of the original unproven charge of murder as a basis for refusing to consider circumstances that could mitigate her sentence. The Iowa Supreme Court has consistently held that a trial court cannot consider additional unproven and unprosecuted charges:

> A sentencing court may not however impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime unless the facts before the court show the accused committed the higher crime or the defendant admits it—even if the prosecutor originally charged the higher crime and reduced the charge. The controlling consideration is whether the accused in fact committed the higher crime, not whether the prosecutor originally charged it.

State v. Thompson, 275 N.W.2d 370, 372 (Iowa 1979).

While the court acknowledged the original charge, there is no showing that the court relied on this in imposing the sentence. The court in imposing sentence considered the nature of the charge and additionally the protection of the community. The consideration of the nature of the offense is a proper consideration in setting the sentence. State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982); State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979).

The sentence is affirmed.

AFFIRMED.